Supreme Court, U.S.
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In the

Supreme Court of the United States

WILLIAM GROSJEAN,

Petitioner,

v.

FIRST ENERGY CORPORATION and
TOLEDO EDISON ENERGY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals affirmed the District Court's granting of Summary Judgment on behalf of First Energy Corporation and its Toledo subsidiary, Toledo Edison Energy, collectively ("First Energy" or "Respondents"), in an age discrimination action against them. The District Court granted summary judgment holding the Plaintiff, William Grosjean ("Grosjean"), failed to demonstrate that First Energy's proffered reason for the demotion, the unfavorable rating, was a pretext for age discrimination. The Sixth Circuit affirmed on an alternative basis, that Grosjean failed to make out his prima facie case of age discrimination because he was not replaced by a person significantly younger than himself.

Two questions are presented:

1. Is the basic evidentiary framework set forth in McDonnell Douglas applicable in the Age Discrimination In Employment Act ("ADEA") context?

2. For purposes of the fourth prong of the McDonnell Douglas framework in an ADEA case, is a bright-line test appropriate which holds that an age difference of six (6) years or less between an employee and a replacement is not sufficient and therefore, for purposes of demonstrating a prima facie case a plaintiff must fail as a matter of law?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Sixth Circuit is reported at *William Grosjean v. First Energy Corp.; Toledo Edison Energy*, No. 02-3361 (6th Cir. 2003). The Sixth Circuit affirmed the February 20, 2000 decision of the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:01CV7213. (See Appendix 1a).

STATEMENT OF JURISDICTION

Jurisdiction of the United States Supreme Court in this case is proper. The U.S. District Court for the Northern District of Ohio, Western Division entered summary judgment on February 20, 2002. Plaintiff timely appealed to the U.S. Court of Appeals for the Sixth Circuit. On November 13, 2003, the Sixth Circuit affirmed the District Court's granting of summary judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §§621 et seq.

Section 623 – Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Petitioner, William Grosjean ("Grosjean"), began his employment with Respondents, First Energy Corporation and Toledo Edison Energy ("Respondents"), in 1970 as a Plant Helper. He progressed through various classifications within Respondents' company as a bargaining unit employee from 1970 through 1990. In 1990, Grosjean was promoted to a supervisory position outside the bargaining unit: Supervisor of Maintenance-Machine Shop I. Eight (8) years later, Grosjean was removed from his supervisory position in the machine shop and was replaced by a younger employee, at which time he was reassigned to the fuel yard as a Supervisor of Maintenance-Yard Operations.

John Gallagher ("Gallagher"), who is approximately five and a half (5½) years younger than

Grosjean, was assigned to acclimate him into his new position. Gallagher had held the title Supervisor of Maintenance – Yard Operations for approximately one (1) year before Grosjean was reassigned. Gallagher had been trained for four (4) or five (5) months by "shadowing" another supervisor until he got his own shift to supervise in February or March of 1998.

Approximately three (3) months after Gallagher received his own shift to supervise, Grosjean transferred in, at which time Grosjean's training consisted of working with Gallagher Monday through Friday, twelve (12) to fourteen (14) hours per day. Gallagher and Grosjean would then split the weekends, one working Saturday, the other working Sunday. At the time Grosjean transferred into the fuel yard, Kenneth Dresner ("Dresner"), who is approximately thirteen (13) years younger than Grosjean, became his supervisor.

Dresner, in 1998, had only begun working at Respondents' Toledo facility, holding the title Director of Production. As the Director of Production, Dresner was responsible for the supervision of the production in the plant, of production of megawatts and also of the fuel yard. Dresner admitted he had very little supervisory training but had attended the Respondents' Performance Appraisal Training to understand how the Respondents' Performance Appraisal system worked.[1] According to Dresner, he had no other supervisory training.

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[1] Respondents' Performance Management Program is the formal mechanism by which an employee's performance is judged and any deficiencies are corrected for any particular year. The

Gallagher testified that when Grosjean arrived at the fuel yard in June of 1998, Grosjean knew a lot more about the fuel yard mechanically than Gallagher did. Gallagher and Grosjean worked the same shift from June of 1998 until the fall of 1998, when Dresner decided to split them into two (2) separate shifts. It was up to Gallagher and Grosjean to decide which shifts to cover. In the fall of 1998, Gallagher and Grosjean decided to alternate shifts weekly. Dresner admitted he did not observe any job performance problems with Grosjean in 1998 and Grosjean received no negative written performance evaluations for the year 1998. Further, Gallagher testified that Dresner told him he was happy with both Gallagher and Grosjean's job performance and could not mange the fuel yard without them.

In March of 2000, Grosjean received a written performance appraisal pursuant to Respondents' Performance Management Program. He received a score of "Does Not Meet," which resulted in his removal as a fuel yard supervisor. Believing that Dresner's rating of "Does Not Meet" and Grosjean's subsequent removal as fuel yard supervisor were age motivated, Grosjean immediately filed a seven (7) page written response to Dresner's evaluation. Dresner, while admittedly knowing Grosjean was complaining that he was discriminated against on the basis of age, chose to hide Grosjean's complaint from the attention of management. Pursuant to Respondents' internal

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Performance Management Program calls for a performance plan, periodic progress reviews, performance review discussions and performance ratings.

discrimination procedure, Grosjean thereinafter filed an internal complaint on April 11, 2000.

Unfortunately for Grosjean, his complaint was assigned to Melissa Glanz ("Glanz"), a human resource representative, for investigation. Glanz had minimal experience in handling human resource matters and had only held her current position for approximately six (6) months. She admitted she received no formal training as to how to conduct investigations of age discrimination. She also admitted that it was only in the year 2000 that she began investigating internal complaints for the Respondents and that Grosjean's complaint was the first internal complaint she ever investigated. She further admitted, at the time of her deposition, that she had investigated up to ten (10) internal complaints in the year 2000 and thirty (30) to forty (40) external complaints[2] in the year 2000, **never** finding for the complaining party.

Glanz conducted a cursory investigation of Grosjean's complaints consisting primarily of speaking with Grosjean, Dresner and Dresner's supervisor, Pete Robinson. Glanz, however, admitted that, during her investigatory meeting with Grosjean, he told her he was being singled out and complained that a similarly situated younger employee, Gallagher, had received a more favorable evaluation, even though their job performance was essentially identical. Glanz testified that she did not review any documentary evidence,

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[2] Glanz indicated that an external complaint is a complaint filed either with a federal agency, such as the Equal Employment Opportunity Commission, or a state agency, such as the Ohio Civil Rights Commission.

including Gallagher's performance evaluation. Consistent with all of Glanz' other investigations, she issued a letter, dated June 2, 2000, stating she found no evidence of discrimination or harassment based on age.

If Glanz had performed even a competent cursory investigation, she would have found that Respondents, through Dresner, completely ignored their Performance Management Program with respect to Grosjean for all of 1999. Dresner admitted that, contrary to Respondents' Performance Management Program, Grosjean received no performance planning meetings, no written performance plan and no periodic progress reviews. Yet, Grosjean's written performance appraisal in March of 2000, which reflected his performance for the year 1999, gave him a rating of "Does Not Meet," which resulted in his removal from the position of Supervisor of Maintenance – Yard Operations. In fact, Dresner admitted Grosjean received no documentation evidencing dissatisfaction with his 1999 job performance.

Therefore, consistent with Grosjean's claims, at no time during 1999, and further at no time before March 1, 2000, did Dresner follow Respondents' mandates with respect to periodic progress reviews, nor did Dresner follow the requirement that if Grosjean did in fact have some performance deficiencies, those deficiencies be documented and provided to Grosjean. This, coupled with the fact that Gallagher, a younger employee who supervised identical employees, performed the same job duties, held the same title and was supervised by Dresner, received a favorable rating, allowed Grosjean to rule out all other explanations, and

caused him to believe Dresner's actions were age motivated.

Initially, Grosjean's job duties were filled by Gallagher, who testified that he assumed Grosjean's job duties for approximately nine (9) months, working one thousand (1000) hours of overtime, plus an extra hour each day for which he was not compensated. During that time period, another employee, Brad Cloyne ("Cloyne"), assumed some of Grosjean's supervisory duties. It is undisputed that Cloyne, at the time he assumed Grosjean's supervisory duties, was in his forties (40's). Admittedly, there exists disputed evidence that Dick Riley ("Riley"), a fifty-two (52) year old employee, eventually took over some of Gallagher's job duties that Grosjean once performed. However, Riley arguably replaced Gallagher and Cloyne replaced Grosjean.

The District Court declined to address any of Respondents' issues with respect to Grosjean's prima facie case. However, a review of Respondents' arguments to the District Court reveals that Respondents never challenged the fourth prong of the McDonnell Douglas evidentiary framework with respect to whether Grosjean was replaced by a younger employee. Despite this, the Sixth Circuit Court of Appeals ignored evidence that Cloyne replaced Grosjean and erroneously held that Riley or Gallagher replaced Grosjean. The Sixth Circuit then used Grosjean's case as a vehicle to announce a bright-line test with respect to the fourth prong of the McDonnell Douglas evidentiary framework by holding an age difference of six (6) years or less between an employee and a replacement is **not significant**. (App. 14a).

REASONS FOR GRANTING THE WRIT

1. The basic evidentiary framework set forth in McDonnell Douglas is applicable in the Age Discrimination In Employment Act ("ADEA") context

The Sixth Circuit Court of Appeals held that, "Age discrimination cases under the ADEA are analyzed under the same framework as employment cases under Title VII." (App. 4a). The Sixth Circuit, relying on *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308, 311-313, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), determined that in order to prove a prima facie case of discrimination a plaintiff must show: (1) that he was a member of a protected group; (2) that he was subject to an adverse employment decision; (3) that he was qualified for the position; and (4) that he was replaced by a significantly younger person. (App. 5a).

First and foremost, the U.S. Supreme Court has never fully adopted the basic evidentiary framework set forth in McDonnell Douglas in the ADEA context. The closest the Supreme Court has come is in *O'Connor*, wherein the Court stated, "We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it." *Id.* at 311. Based on that assumption, the Court framed the issue in *O'Connor* as what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production. *Id.* This Court went on to state, "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is

substantially younger than the plaintiff is a far more reliable indicator of age discrimination ..." *Id.* at 311.

This Court, however, was careful not to establish a bright-line test, or other definitional mechanism to define what "substantially younger" means. The Sixth Circuit, while recognizing that no other Circuit has ever established a bright-line test, did so even though it is unclear whether the evidentiary framework of McDonnell Douglas even applies to ADEA cases.

2. For purposes of the fourth prong of the McDonnell Douglas framework in an ADEA case, a bright-line test is appropriate which holds that an age difference of six (6) years or less between an employee and a replacement is not sufficient and therefore, for purposes of demonstrating a prima facie case a plaintiff must fail as a matter of law

Despite the ample evidence that Grosjean was replaced by Cloyne, who was in his forties, the Sixth Circuit held that Grosjean was in fact replaced by Riley, who was three (3) years younger than Grosjean, or Gallagher, who was five and a half (5½) years younger than Grosjean and, therefore, that Grosjean was not replaced by an employee who was sufficiently younger. The Sixth Circuit acknowledged that no other circuit has ever annunciated a bright-line test. Further, in spite of acknowledging that some circuits have allowed plaintiffs to make out a prima facie case if they were replaced by someone three (3) or five (5) years younger than them, the Sixth Circuit still established a rule that in order to make out the prima

facie case, the employee would have to be replaced by someone more than six (6) years younger.

Many courts, including the Sixth Circuit until the present case, have maintained that even if the McDonnell Douglas test was applicable to an ADEA case, the age difference necessary to satisfy the fourth prong of the inquiry is a question of fact for the fact finder. *Cicero v. Borg Warner Automotive Inc.*, 280 F.3d 579 (6th Cir. 2000), quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 509-510, 509 n.3, 113 S.Ct. 2742 (noting that if "reasonable minds could differ," a fact finder "will be called upon" to decide whether "a preponderance of the evidence establishes the facts of a prima facie case").

Obviously the Sixth Circuit now holds that "reasonable minds" cannot differ unless the age difference is more than six (6) years. Of course, no other circuit has such a harsh rule and, in fact, most circuits have acknowledged that this Court has stressed that the McDonnell Douglas test was not intended to be a rigid or ritualistic test of disparate treatment. *United States Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1982). Most courts agree the burden that an employment discrimination plaintiff must meet to defeat a motion for summary judgment, at the prima facie stage, is deminimis. *McLee v. Chrysler Corp.* 109 F.3d 130, 134 (2nd Cir. 1997).

The Second Circuit frames the McDonnell Douglas burden shifting analysis, for purposes of ADEA, as (1) the plaintiff is within a protected age group; (2) the plaintiff is qualified for the position; (3)

the plaintiff was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. *Burger v. New York Institute of Technology*, 94 F.3d 830, 833 (2nd Cir. 1996). In fact, the Second Circuit maintains that an ADEA plaintiff is not required to show that he or she was replaced by a younger employee. *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2nd Cir. 1994). Furthermore, the Sixth Circuit acknowledged that the Second Circuit, in an unpublished opinion, found a one (1) year difference to be sufficient. (App. 14a).

Other circuits, such as the Eleventh Circuit, have held that an age difference of three (3) years is sufficient to establish a prima facie case. *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1003 (11th Cir. 1997). Likewise, the Eleventh Circuit has held that a five (5) year difference also satisfies the "substantially younger" replacement requirement. *Damon v. Fleming Supermarkets Florida*, 196 F3d. 1354, 1360 (11th Cir. 1999).

The Ninth Circuit Court of Appeals has also recognized that replacement by an even older employee will not necessarily foreclose prima facie proof if other direct or circumstantial evidence supports an inference of discrimination. *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981), citing *Loeb v. Textron, Inc.* 600 F.2d 1003, 1013 n.9 (1st Cir. 1979). The Ninth Circuit has also held that replacement by a person five (5) years younger met the fourth prong of the prima facie burden. *Douglas* at 533.

The Sixth Circuit maintained, in the current case, that the bright-line test would only be used in

cases that lack direct evidence that the employer considered age to be significant. This holding, therefore, will preclude plaintiffs who may have been replaced by someone six (6) years younger and who have other circumstantial evidence, from surviving summary judgment. In other words, even though the McDonnell Douglas framework is one of many ways a plaintiff can establish discrimination by circumstantial evidence, any employee who was not replaced by someone more than six (6) years younger will never get the chance to demonstrate any other circumstantial evidence. Therefore, even if the employee can rebut the employer's pretext, the employee will not survive summary judgment because of the Sixth Circuit's rigid bright-line test. In the current case, therefore, because of the Sixth Circuit's erroneous holding that he was replaced by Riley or Gallagher, and not Cloyne, Grosjean is precluded from bringing forth other circumstantial evidence to demonstrate an inference of discrimination.

Under the bright-line test, the Sixth Circuit now has a vehicle to ignore evidence from Grosjean and other plaintiffs. For example, courts have found that a company's failure to follow its own internal procedures is sufficient evidence to create a jury issue with respect to whether the company's justification was pretextual. (*Russell v. McKinney Hospital Ventures*, 235 F.3d 219, 224 (5th Cir. 2000). However, in Grosjean's case, the Sixth Circuit felt free to ignore evidence that Respondents failed to follow their own internal Performance Management Program when demoting Grosjean. Therefore, Grosjean, and plaintiffs like Grosjean, will not be able to rely on other circumstantial evidence of discrimination because they

will not survive summary judgment under the bright-line test the Sixth Circuit has established as the prima facie hurdle.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-3361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM GROSJEAN,
Plaintiff-Appellant,

v.

FIRST ENERGY CORPORATION;
TOLEDO EDISON ENERGY,
Defendants-Appellees.

August 7, 2003, Argued
November 13, 2003, Decided
November 13, 2003, Filed

COUNSEL: ARGUED: John D. Franklin, LAW OFFICES OF JOHN D. FRANKLIN & ASSOCIATES, Toledo, Ohio, for Appellant.

Denise M. Hasbrook, ROETZEL & ANDRESS, Toledo, Ohio, for Appellees.

ON BRIEF: John D. Franklin, LAW OFFICES OF JOHN D. FRANKLIN & ASSOCIATES, Toledo, Ohio, for Appellant.

Denise M. Hasbrook, ROETZEL & ANDRESS, Toledo, Ohio, for Appellees.

JUDGES: Before: BOGGS, Chief Judge; SILER, Circuit Judge; and RICE, District Judge. *

OPINION BY: BOGGS

OPINION:

BOGGS, Chief Judge. William Grosjean appeals the district court's summary judgment for his employers, First Energy Corporation and its Toledo subsidiary, Toledo Edison Energy, (collectively "First Energy"), in his age discrimination action against them. Grosjean had lost his supervisory title and duties after his superior had rated him as inadequate in dealing with his subordinates. The district court granted summary judgment because Grosjean failed to demonstrate that First Energy's proffered reason for the demotion, the unfavorable rating, was a mere pretext. We affirm on the alternative basis that Grosjean failed to make his prima facie case of age discrimination because he was not replaced by a person significantly younger than himself.

I

First Energy hired Grosjean in 1970 as a plant helper, a unionized position. Over the following two decades he was steadily promoted until in 1990 he joined management as a machine shop supervisor at First Energy's Bayshore, Ohio, power plant. In 1997, he was reassigned to a position as yard supervisor. His new responsibilities included scheduling the large coal trains that fed the power plant, supervising the fourteen workers who unloaded the trains, and disposing of the ash generated. Grosjean was instructed in these duties

by John Gallagher, an experienced yard supervisor. After six months of training, Gallagher and Grosjean divided the shifts between them. Both Gallagher and Grosjean worked weekdays and would split weekend shifts. Their supervisor during the relevant period was the director of production, Kenneth Dresner.

During 1998, there appear to have been no problems with Grosjean's performance. However, during 1999, Dresner and Grosjean had a series of meetings to discuss what Dresner felt were inadequacies in management style. The common element of these complaints was that Dresner considered Grosjean to be neither sufficiently strict with the workers under his supervision nor loyal to Dresner. In Dresner's view, these meetings did not result in an appreciable improvement in the problem areas. On March 2, 2000, Grosjean met with Dresner to discuss his performance rating report for 1999, authored by Dresner. This report, while praising Grosjean's technical competence, was damning with respect to his management role. On this basis, Dresner recommended a performance rating of "does not meet expectations." As a result of this rating, Grosjean was reassigned from his supervisory position to a newly-created position of planner. As a planner, he would continue to schedule trains and receive the same salary and benefits, but he would no longer have supervisory responsibility for any other employees. Grosjean's supervisory duties were returned to Gallagher on a temporary basis. As a consequence Gallagher worked more than a thousand hours overtime during the remaining ten months of the year. Eventually, the position was filed by Richard Riley. At the time of Dresner's unfavorable performance rating, Grosjean was 54 years old, Dresner

was 41 years old, Gallagher was 48 years old, and Riley was 51 years old.

On May 2, 2001, Grosjean filed a complaint against First Energy in the United States District Court for the Northern District of Ohio. In it he claimed that First Energy had discriminated against him on the basis of his age, in violation of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Ohio anti-discrimination statute, Ohio Rev. Code § 4112.02. In particular, Grosjean alleged that First Energy had demoted him from his supervisory position, that he had been denied a bonus for the year 1999, and that he had been denied a promotion back to his old position. On February 22, 2002, the district court granted summary judgment to First Energy on the basis that Grosjean had presented insufficient evidence that First Energy's stated legitimate, non-discriminatory reason for its actions, the unfavorable performance report, was pretextual. Before this court now is Grosjean's timely appeal of that grant.

II

Age discrimination cases under the ADEA are analyzed under the same framework as employment discrimination cases under Title VII. Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 538 (6th Cir. 2002) (citing Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992)). Proof in such cases proceeds in three stages. Kline v. TVA, 128 F.3d 337, 342 (6th Cir. 1997) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). First, "in order

to prove a prima facie case of discrimination, a plaintiff must show 1) that he is a member of a protected group, 2) that he was subject to an adverse employment decision, 3) that he was qualified for the position, and 4) that he was replaced by a person outside of the protected class." Kline, 128 F.3d at 349 (citing Talley v. Bravo Pitino Restaurant, 61 F.3d 1241, 1246 (6th Cir. 1995)). In age discrimination cases, the protected class includes all workers at least 40 years old and the fourth element is modified to require replacement not by a person outside the protected class, but merely replacement by a significantly younger person. Kline, 128 F.3d at 352-53; O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-13, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996). Second, "if the plaintiff establishes [a] prima facie case, the burden then shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Kline, 128 F.3d at 342 (quoting Burdine, 450 U.S. at 252-53). Third, after the defendant has met this burden, "the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation." Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994). In some cases, plaintiff's evidence establishing the prima facie case can also be sufficient to meet one or more of the elements necessary to rebut the defendant's proffered non-discriminatory reasons. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 149, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

We conclude that Grosjean was not replaced by a significantly younger person. He therefore failed to make his prima facie case and we need not address the legitimate-reason and pretext parts of the *McDonnell*

analysis, the bases on which the district court decided the issue.

Grosjean argues that he was initially replaced by Gallagher, who temporarily took over his duties in addition to his own. However, Gallagher's assumption of Grosjean's duties does not constitute replacement under the law of this circuit. A "person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990) (citing Sahadi v. Reynolds Chem., 636 F.2d 1116, 1117 (6th Cir. 1980)); *see also* Lilley v. BTM Corp., 958 F.2d 746, 752 (6th Cir. 1992) ("Spreading the former duties of a terminated employee among the remaining employees does not constitute replacement."); Godfredson v. Hess & Clark, 173 F.3d 365, 372-73 (6th Cir. 1999) (reaffirming Barnes, 896 F.2d at 1465).

Grosjean was replaced, in both the colloquial and the legal meanings of that term, by Riley. That Riley was as much part of the protected class of workers over 40 as Grosjean does not preclude the making of a prima facie case.The fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.O'Connor, 517 U.S. at 312. However, "the prima

facie case requires evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." Ibid. This "inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." Id. at 313. n1 Therefore, the question reduces to whether Riley, at age 51, was significantly younger than Grosjean, at age 54. n2

Age differences of ten or more years have generally been held to be sufficiently substantial to meet the requirement of the fourth part of age discrimination prima facie case. *See, e.g.*, Balut v. Loral Elec. Sys., 166 F.3d 1199, 1998 WL 887194, at *1 (2d Cir. 1998) (table) (replacement of 57-year old with 47-year old was sufficient); Sempier v. Johnson & Higgins, 45 F.3d 724, 729-30 (3d Cir. 1995) (replacement of employee with two others, one "well over ten years younger," sufficient); Hollander v. Am. Cyanamid Co., 172 F.3d 192, 199 & n.3 (2d Cir. 1999) (transfer of duties from 58-year old to two other employees, one 11 years and one 8 months younger, sufficient); O'Connor v. DePaul Univ., 123 F.3d 665, 669-70 & n.2 (7th Cir. 1997) (replacement of 43-year old by 32-year old sufficient); Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 341 (6th Cir. 1998) (replacement of 51-year old by employee "around 40" sufficient); EEOC v. Bd. of Regents of the Univ. of Wis. Sys., 288 F.3d 296, 303 (7th Cir. 2002) (termination of 47-year old while retaining "woman in her twenties or thirties" sufficient; so was termination of 54-year old while retaining 23-year old); Rhymer v. Yokohama Tire Corp., 106 F.3d 391, 1997 WL 14143, at *3 (4th Cir. 1997) (replacement of a 54-year old by a 41-year old sufficient); Brennan v. Metropolitan Opera Ass'n, 192 F.3d 310, 317 (2d Cir. 1999) (stating that replacement of

a 47-year old by a 33-year old "may well have met" the "de minimis burden of establishing a prima facie case of age discrimination"); Mroz v. Elec. Data Sys. Corp., 124 F.3d 198, 1997 WL 468331, at *4 (6th Cir. 1997) (table) (31- and 33-year-old workers significantly younger than 47-year old plaintiff); Keathley v. Ameritech Corp., 187 F.3d 915, 923-24 (8th Cir. 1999) (replacement of salespersons over 45 by those under 35 created reasonable inference of age discrimination); Cheng v. MINACT, 103 F.3d 128, 1996 WL 724372, at *5 n.2 (6th Cir. 1996) (table) (age disparity between 60-year old teacher and teacher in mid-40s sufficient); Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998) (replacement of 47-year old by 32-year old sufficient); Simpson v. Kay Jewelers, 142 F.3d 639, 649 (3d Cir. 1998) (Pollak, J., concurring that replacement of 57-year old by 42-year old sufficient); Miller v. Borden, 168 F.3d 308, 314 (7th Cir. 1999) (replacement of man "approaching 60" with two others in their 40s sufficient); Bunch v. Board of Educ., 201 F.3d 440, 1999 WL 1206875, at *2 (6th Cir. 1999) (table) (passing over of 53-year old for promotion eight times, six times for persons under age 40, sufficient); Tichenor v. Sec'y of Army, 181 F.3d 104, 1999 WL 357813, at *2 (6th Cir. 1999) (table) (promotion of 38-year old over 53-year old sufficient); Pope v. City of Cleveland, 22 Fed. Appx. 474, 475, 2001 WL 1355597, at *1 (6th Cir. 2001) (table) (promotion of 38-year old over 54-year old sufficient); Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 236 (3d Cir. 1999) (discharge of plaintiff while retaining employees 8 and 16 years younger sufficient); Baron v. City of Highland Park, 195 F.3d 333, 340 (7th Cir. 1999) (denial of promotion to 47-year old while promoting 30-year old and 31-year old sufficient); Isenbergh v. Knight-Ridder Newspaper Sales, 97 F.3d

436, 440 & n.1 (11th Cir. 1996) (promotion of 44-year old over 60-year old sufficient); Weigel v. Baptist Hosp., 302 F.3d 367, 375 (6th Cir. 2002) (44-year old substantially younger than 60-year old); O'Connor, 517 U.S. at 312 (implying that difference between 56-year old and 40-year old is substantial); Roxas v. Presentation Coll., 90 F.3d 310, 316 (8th Cir. 1996 (denial of application for sabbatical to 54-year old while approval of same to 37-year old sufficient); Carlton v. Mystic Transp., 202 F.3d 129, 135 (2d Cir. 2000) (replacement of terminated employee with employees 18 and 25 years younger sufficient); Ridley v. Lucent Techs., 22 Fed. Appx. 571, 2001 WL 1563636, at *1 (6th Cir. 2001) (hiring of 31-year old over 49-year old sufficient); Fester v. Farmer Bros. Co., 49 Fed. Appx. 785, 2002 WL 31323499, at *5 (10th Cir. 2002) (table) (attempted replacement of 58-year old by man in late 30s sufficient); Abrams v. Millikin & Fitton Law Firm, 267 F. Supp. 2d 868, 875 (S.D. Ohio 2003) (replacement of legal assistant of unspecified age, but 39 years of tenure at defendant, by 38-year old sufficient); Banks v. Travelers Cos., 180 F.3d 358, 367 (2d Cir. 1999) (replacement of 49-year old with 27-year old sufficient); Staton v. Husky Computers, 176 F.3d 484, 1998 WL 808019, at *2 (9th Cir. 1998) (table) (replacement of 55-year old with 33-year old sufficient); Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 102 (2d Cir. 2001) (hiring of 42-year old over 64-year old sufficient); Koster v. Trans World Airlines, 181 F.3d 24, 32 (1st Cir. 1999) (retained 25-year old manager "substantially younger" than furloughed 49-year old manager); Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1141 (7th Cir. 1998) (passing over 63-year old for 39-year old sufficient); Wexler v. White's Furniture, 317 F.3d 564, 592 (6th Cir. 2003) (en banc) (Krupansky, J., agreeing in

dissent that replacement of 59-year old by man in his early 30s sufficient); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 917 (9th Cir. 1996) (replacement of 54-year old by 25-year old sufficient); Krieg v. Kimball Intern., 33 F.3d 56, 1994 WL 459561, at *3 (7th Cir. 1994) (table) (55-year old substantially older than man 30 years his junior).

The overwhelming body of cases in most circuits has held that age differences of less than ten years are not significant enough to make out the fourth part of the age discrimination prima facie case. *See, e.g.*, Girten v. McRentals, 337 F.3d 979, 981 (8th Cir. 2003) (stating that replacement of 63-year old by 54-year old may be insufficient); Radue v. Kimberly-Clark Corp., 219 F.3d 612, 619 (7th Cir. 2000) (termination of 53-year old while retaining 46-year old and 44-year old, without more, insufficient); Lesch v. Crown Cork & Seal Co., 282 F.3d 467, 472 (7th Cir. 2002) (replacement of 62-year old accountant by 53-year old insufficient); Dunaway v. Int'l Bhd. of Teamsters, 354 U.S. App. D.C. 36, 310 F.3d 758, 767 (D.C. Cir. 2002) (replacement of employee by other 7 years younger insufficient without more); Richter v. Hook-SupeRx, 142 F.3d 1024, 1029 (7th Cir. 1998) (replacement of 52-year old by 45-year old insufficient); Black v. Columbus Pub. Sch., 124 F. Supp. 2d 550, 574-75 (S.D. Ohio 2000) (replacement of 52-year old by 45-year old insufficient); Hartley v. Wisc. Bell, 124 F.3d 887, 892 (7th Cir. 1997) (age difference of 6 or 7 years presumptively insufficient); Woodsmall v. Eclipse Mfg. Co., 249 F. Supp. 2d 918, 923-24 (E.D. Tenn. 2002) (implying that replacement of 59-year old with 53-year old insufficient); Wassel v. Mutual Life Ins. Co., 164 F.3d 633, 1998 WL 700537, at *1 (9th Cir. 1998) (table) (replacement by person 6 years younger insufficient);

Kalagian v. Carwein, 57 F.3d 1077, 1995 WL 323801, at *1 (9th Cir. 1995) (table) (replacement of 50-year old with two 44-year olds insufficient); Mroz, 124 F.3d 198, [WL] at *4 (6th Cir. 1997) (table) (41-year-old worker not significantly younger than 47-year-old plaintiff); Cramer v. Intelidata Techs. Corp., 168 F.3d 481, 1998 WL 911735, at *3 (4th Cir. 1998) (table) (replacement of employee with person 5 years younger insufficient); Wellman v. Wheeling & Lake Erie Ry. Co., 134 F.3d 373, 1998 WL 25005, at *4 (6th Cir. 1998) (table) (replacement of 46-year old with 41-year old insufficient); Cianci v. Pettibone Corp., 152 F.3d 723, 728 (7th Cir. 1998) (replacement of 47-year old by 42-year old, even combined with supervisor's comment that plaintiff was "getting too old for the job," insufficient); Schiltz v. Burlington N.R.R., 115 F.3d 1407, 1412 & n.6 (8th Cir. 1997) (where six positions that 48-year old plaintiff applied for were filled by persons aged 43, 46, 51, 55, 48, and 47 no prima facie age discrimination case exists); Bush, 161 F.3d at 368 (6th Cir. 1998) (replacement of 46-year old by 41-year old insufficient); Steiner v. Envirosource, 134 F. Supp. 2d 910, 917 (N.D. Ohio 2001) (termination of 62-year old while retaining 57-year old and 59-year old insufficient); Brown v. EG & G Mound Applied Tech., 117 F. Supp. 2d 671, 677-78 (S.D. Ohio 2000) (replacement of 57-year old by 52-year old insufficient); Bennington v. Caterpillar Inc., 275 F.3d 654, 659 (7th Cir. 2001) (replacement of 57-year old with 52-year old insufficient); Scott v. Parkview Memorial Hosp., 175 F.3d 523, 525 (7th Cir. 1999) (age difference between group aged 32 to 46 and group aged 42 to 48 not substantial); Clevidence v. Wayne Savings Cmty. Bank, 143 F. Supp. 2d 901, 907-08 (N.D. Ohio 2001) (replacement of 46-year old by 43-year old insufficient);

Hoffmann v. Primedia Special Interest Publ'ns, 217 F.3d 522, 525 (7th Cir. 2000) (replacement of 42-year old with 39-year old insufficient); Williams v. Raytheon Co., 220 F.3d 16, 20 (1st Cir. 2000) ("three year age difference is too insignificant to support a prima facie case of age discrimination"); O'Connor, 517 U.S. at 312-13 (implying that difference between 68-year old and 65-year old is not substantial); Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1166 (10th Cir. 2000) (holding "that because plaintiff's replacement was only two years his junior-an obviously insignificant difference-the necessary inference of discrimination was precluded, and he failed to establish his prima facie case"); Hillman v. Safeco Ins. Co. of Am., 190 F. Supp. 2d 1029, 1038 (N.D. Ohio 2002) (replacement of 54-year old by 54-year old insufficient); Lovas v. Huntington Nat. Bank, 215 F.3d 1326, 2000 WL 712355, at *3 (6th Cir. 2000) (table) (demotion and termination of 48-year old officer where older officers were retained insufficient).

One of our sister circuits made use of this apparent bifurcation of the case law to adopt a bright-line rule for prima facie age discrimination cases. Hartley v. Wisc. Bell, 124 F.3d 887 (7th Cir. 1997). The Seventh Circuit "considers a ten-year difference in ages (between the plaintiff and her replacement) to be presumptively 'substantial' under *O'Connor*." Id. at 893. "Any age disparity less than ten years is 'presumptively insubstantial.'" Kariotis v. Navistar Int'l. Transp. Corp., 131 F.3d 672, 676 n.1 (7th Cir. 1997) (citing Hartley, 124 F.3d at 893). Hence, that circuit defines "substantially younger" as 10 years younger. Ibid. Accord Balderston v. Fairbanks Morse Engine, 328 F.3d 309, 322 (7th Cir. 2003); EEOC v. Bd. of Regents of Univ. of Wisc. Sys.,

288 F.3d 296, 302 (7th Cir. 2002). "In cases where the disparity is less, the plaintiff still may present a triable claim if she directs the court to evidence that her employer considered her age to be significant." Hartley, 124 F.3d at 893.

No other circuit, including this circuit, has previously adopted such a bright-line rule. *See* Cicero v. Borg-Warner Auto., 280 F.3d 579, 588 (6th Cir. 2002). Nevertheless, only a handful of cases in a few categories have been decided contrary to the *Hartley* rule. Age differences of 8 or 9 years have been held to be sufficient. *See* Cicero, 280 F.3d at 588 (leaving the question of whether 43-year old was substantially younger than 51-year old to jury); Tarshis v. Riese Org., 211 F.3d 30, 38 (2d Cir. 2000) (replacement of 67-year old with 59-year old sufficient); Fisher v. Vassar Coll., 66 F.3d 379, 1995 WL 527804, at *29 (2d Cir.) (table) (48-year old and 44-year old professors were substantially younger than 53-year old), *republished as amended*, 70 F.3d 1420, 1450-51 (2d Cir. 1995) (same).

The Ninth Circuit has not settled on a standard for substantial age difference and its case law is accordingly inconsistent. *Compare* Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981) (replacement by person 5 years younger sufficient), *and* Estate of McGough v. Lockheed Martin, 12 Fed. Appx. 464, 2001 WL 275007, at *3 & n.2 (9th Cir. 2001) (table) (implying that replacement of 48-year old by 41-year old sufficient) *with* Wassel, 164 F.3d 633, [WL] at *1 (holding replacement by person 6 years younger insufficient while citing *Douglas*), and Kalagian, 57 F.3d 1077, [WL] at *1 (replacement of 50-year old with two 44-year olds insufficient).

The Eleventh Circuit set an early precedent allowing age discrimination cases to proceed with as small an age difference as three years and subsequent decisions have been bound by that precedent. Carter v. City of Miami, 870 F.2d 578, 583 (11th Cir. 1989) (replacement of 49-year old with 46-year old sufficient); Carter v. DecisionOne Corp., 122 F.3d 997, 1003 (11th Cir. 1997) (replacement of 42-year old with 39-year old sufficient, citing *Carter v. City of Miami*); Damon v. Fleming Supermarkets, 196 F.3d 1354, 1359-60 (11th Cir. 1999) (replacement of 42-year old by 37-year old sufficient, citing *Carter v. City of Miami*).

Finally, the Second Circuit in an unpublished opinion found a one-year age difference to be sufficient, but based that conclusion on a supervisor's ageist comments. Nembhard v. Memorial Sloan Kettering Cancer Ctr., 104 F.3d 353, 1996 WL 680756, at *3-4 (2d Cir. 1996) (table). *Nembhard* is consistent with *Hartley* because under *Hartley* smaller age differences may still present a triable claim where there is evidence that the employer considered age to be significant.

Given this array of authority, and our circuit's precedent, we hold that, in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant. This rule will assist district courts in making a firm determination, yet does not encroach on our precedent holding that eight years can be a significant age difference. The standard is also at least as lenient towards plaintiffs as all decisions of our sister circuits with the exception of the standard-less Ninth Circuit and the three-year-standard Eleventh Circuit.

As Grosjean was not more than six years older than Riley or Gallagher and he presents no direct evidence that First Energy considered age to be significant, his federal age discrimination claim fails. "Under Ohio law, the elements and burden of proof in a state age-discrimination claim parallel the ADEA analysis." Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 357 (6th Cir. 1998) (citing McLaurin v. Fischer, 768 F.2d 98, 105 (6th Cir. 1985), and Barker v. Scovill, Inc., 6 Ohio St. 3d 146, 6 Ohio B. 202, 451 N.E.2d 807, 808 (Ohio 1983)). Therefore, as Grosjean's federal claim failed, so must his state law claim.

III

For the foregoing reason, we AFFIRM the judgment of the district court.

Footnotes

* The Honorable Walter Herbert Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

n1 *O'Connor* clarifies the fourth part of a prima facie age discrimination case; it does not eliminate it. The decision of a district court within this circuit to the contrary is not correct. Ligon v. Triangle Pac. Corp., 935 F. Supp. 936, 941 (M.D. Tenn. 1996).

n2 In addition, here Gallagher was the obvious temporary replacement, as he had been doing exactly the same job as Grosjean. Thus our focus is on the 3-year age difference with Riley in determining this

issue, though we also note that even the difference with Gallagher was only 6 years.

Case No. 3:01 CV 7213

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Grosjean,
Plaintiff,

v.

First Energy Corporation, et al.,
Defendants.

Filed February 20, 2002

ORDER

Plaintiff William Grosjean brings this action against Defendants First Energy Corporation and Toledo Edison Energy claiming he was discriminated against on the basis of age. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Pending is defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). For the following reasons, defendants' motion shall be granted.

BACKGROUND

Plaintiff began working for Defendant Toledo Edison Energy in 1970. Plaintiff alleges that in March of 2000, plaintiff was removed from a supervisory position following an unfavorable evaluation. Plaintiff alleges he was denied a salary bonus while a younger employee received the bonus for work both plaintiff and the

younger employee performed. Plaintiff further alleges that similarly situated younger employees received higher salaries.

After sending correspondence to the director of the First Energy Bayshore Plant and filing an internal discrimination complaint complaining of age discrimination during April of 2000, plaintiff reapplied for his former supervisory position. Plaintiff was not placed in the position. Plaintiff subsequently filed a charge with the Ohio Civil Rights Commission and Equal Employment Opportunity Commission alleging that defendants discriminated against him on the basis of age.

Plaintiff brings this action alleging that defendants violated the Age Discrimination in Employment Act, 29 U.S.C. § 626, and Ohio Revised Code § 4112.02(A) and (N) through a demotion, denial of a promotion, and denial of bonuses.

STANDARD OF REVIEW

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts

showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting FED. R. CIV. P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex, 477 U.S. at 324.

In deciding the motion for summary judgment, the evidence of the non-moving party will be believed as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in the non-moving party's favor. Eastman Kodak Co. v. Technical Servs., Inc., 504 U.S. 451, 456 (1992). Summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

DISCUSSION

Plaintiff claims defendants violated that Age Discrimination in Employment Act, 29 U.S.C. § 626,

and Ohio Revised Code § 4112.02(A) and (N) by demoting him, denying him a promotion, and denying him bonuses.

When a plaintiff does not have direct evidence of age discrimination, an age discrimination claim involves the three-part framework first established in McDonnell Douglas v. Green, 411 U.S. 792 (1973). Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir. 1998). The plaintiff must prove a prima facie case of discrimination: 1) plaintiff was at least 40 years old at the time of the alleged discrimination; 2) plaintiff suffered an adverse employment action; 3) plaintiff was otherwise qualified for the position lost or not gained; and 4) after plaintiff was rejected or terminated, a substantially younger applicant was selected. Burzynski v. Cohen, 264 F.3d 611, 622 (6th Cir. 2001) (citing Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 341 (6th Cir. 1998)); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1081 (6th Cir. 1994).

Once the plaintiff proves a prima facie case, the defendant must put forth a legitimate nondiscriminatory reason for its conduct. Scott, 160 F.3d at 1126 (citing Manzer, 29 F.3d at 1082). To recover, the plaintiff then must prove the defendant's legitimate nondiscriminatory reason is a pretext for discrimination. Id. (citing Manzer, 39 F.3d at 1083).

Defendants contend plaintiff's age discrimination claim must fail because: 1) plaintiff has not exhausted his administrative remedies; 2) plaintiff cannot establish his prima facie case because no adverse employment action was taken and plaintiff was not qualified; and 3) plaintiff cannot prove that defendants' articulated

legitimate nondiscriminatory reasons were a pretext for discrimination. Because I agree that plaintiff cannot prove that defendants' legitimate nondiscriminatory reasons were a pretext for age discrimination, I decline to address defendants' initial arguments.

I. Pretext

A plaintiff establishes pretext by showing the defendant's legitimate nondiscriminatory reason: 1) had no basis in fact; 2) did not actually motivate the defendant's actions; or 3) was insufficient to warrant the defendant's actions. Manzer, 29 F.3d at 1084.

The first method of establishing pretext requires the plaintiff to show the facts necessary for the defendant's legitimate nondiscriminatory reason never occurred or were false. Id. The second method of proving pretext requires the plaintiff to establish that the weight of the circumstantial evidence makes it more likely than not that the defendant's legitimate nondiscriminatory reason is a pretext. Id. ("In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant."). The third method of establishing pretext requires the plaintiff to show that other employees, such as employees not in the protected class, did not suffer adverse employment action for the same conduct the plaintiff engaged in. Id.

To meet any pretext theory, "the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation." Id. at 1083. If the plaintiff shows the defendant's legitimate

nondiscriminatory reason is a pretext for discrimination, the jury may infer discrimination. Dews v. A.B. Dick Co., 231 F.3d 1016, 1021 (6th Cir. 2000) (citation omitted). The plaintiff retains the ultimate burden of proof at all times. Id. (citation omitted).

Defendants provided numerous legitimate nondiscriminatory reasons in an affidavit by Kenneth J. Dresner, plaintiff's supervisor since May 12, 1998. Defendants contend that action was not taken against plaintiff because of any one reason; a combination of issues resulted in plaintiff's transfer. Dresner met with plaintiff three times before plaintiff was transferred.

On July 28, 1999, Dresner discussed several occurrences for correction in the future: 1) plaintiff's failure to document an employee's sleeping on the job; 2) plaintiff's complaint to the safety director about extensive hours without first consulting Dresner; 3) excessive time required to unload trains due to plaintiff's failure to schedule enough personnel; 4) undermining of the company's position by supporting the Union's position in front of Union members; 5) plaintiff's failure to defend the company during allegations that a structure condition looked bad; 6) plaintiff's failure to defend the company when an employee expressed safety concerns or alert the employee to the fact that the safety concerns were corrected; 7) plaintiff's failure to resolve a conflict involving bulldozer operators who wanted to smoke in their vehicles; and 8) plaintiff's failure to reject vacation requests once they were excessive.

On November 4, 1999, Dresner again met with plaintiff to discuss: 1) plaintiff's scheduling of overtime when

unnecessary; 2) the docking of an employee's pay for his failure to arrive on time; 3) plaintiff's repeated departure from a fact-finding meeting where he was a necessary witness; and 4) plaintiff's failure to assume leadership duties by referring an employee to Dresner to discuss release of the employee from restricted duty.

On December 15, 1999, Dresner met with plaintiff to discuss: 1) an employee's failure to obtain new safety shoes by November 26, 1999; 2) plaintiff's grant of unpaid time off to an employee without a doctor's slip; and 3) Dresner's overall dissatisfaction with plaintiff's work performance. Defendants contend plaintiff cannot prove these reasons were a pretext for discrimination. Plaintiff argues he can prove pretext by showing these reasons had no basis in fact, actually did not motivate defendants' actions, or were insufficient to warrant defendants' actions.

Plaintiff initially argues that Dresner never provided written documentation of performance deficiencies to plaintiff and therefore failed to follow company procedures under the Performance Approval Program.1 Plaintiff contends this failure is sufficient to create a jury issue on pretext.

As defendants point out in their reply brief, the company policy does not include a requirement that supervisors give employees written documentation of performance deficiencies. The policy states that written documentation is required, but the language clearly does not require supervisors to give such documentation to employees. Plaintiff, therefore, cannot establish pretext through the failure to provide him with written documentation of his performance

deficiencies because he has not shown that defendants failed to follow company policy or procedures.

Plaintiff's brief next spends much time refuting each of defendants' legitimate nondiscriminatory reasons as listed in Dresner's affidavit. Defendants contend that plaintiff challenges insignificant facts and discrepancies, and therefore, a genuine issue of material fact does not exist.

Dresner's affidavit states that he had doubts as to plaintiff's supervisory judgment beginning in 1998. Plaintiff argues that Dresner later admitted that this statement was false and could not remember an example of a problem with plaintiff's judgment in 1998. Plaintiff, however, was not given a negative evaluation in 1998; the negative evaluation occurred in 1999. While plaintiff points out a discrepancy between the Dresner's affidavit and deposition, the discrepancy necessarily does not show defendants' actions were a pretext for discrimination.

Plaintiff disputes Dresner's allegation that plaintiff paid Jose Salazar for one hour that Salazar did not work. Plaintiff points out that Dresner later admitted that Salazar was only 0.8 hours late and was docked pay for that time. The facts that Dresner initially believed Salazar to be one hour late, and Salazar actually was 0.8 hours late, and Dresner initially believed that Salazar was not docked pay are minor discrepancies that hardly could be genuine issues of material fact. Plaintiff, furthermore, has not challenged whether Dresner honestly held these beliefs. See Smith v. Chrysler, 155 F.3d 799, 807 (6th Cir. 1998) (employer's legitimate

nondiscriminatory reason for its action is not a pretext for discrimination if the reason is "honestly held").

Plaintiff disputes Dresner's affidavit allegation that plaintiff scheduled unnecessary overtime for Barbara Mowka. Plaintiff argues that he informed Mowka, at the time she committed to working, that he would not replace her if she did not work. Plaintiff states, "After she committed to coming in, Mowka apparently called off. . . . According to [plaintiff], he made his point with Mowka and the union by not replacing the overtime." (Doc. 40 at 28). Plaintiff fails to explain what he means by "his point." He does not, however, dispute that the overtime was unnecessary—the basis for defendants' nondiscriminatory reason.

Plaintiff also contends that he did not know of Dresner's dissatisfaction with the way plaintiff addressed the situation until his March 2000 performance evaluation meeting. Plaintiff, however, does not provide evidence that Dresner was required to inform plaintiff of such dissatisfaction before the March 2000 performance evaluation meeting.

Plaintiff disputes Dresner's affidavit allegation that plaintiff did not require medical documentation from Pat Barrett for his absences from work on November 22, 1999 and December 6, 1999. Plaintiff states that Dresner later admitted that Barrett provided medical documentation for one absence. Plaintiff also disputes the allegation that he gave Barrett time off without a medical excuse and states that a younger supervisor was not disciplined for giving Barrett time off without a medical excuse.

Plaintiff does not dispute defendants' main argument though:

> Accordingly, there were two distinct failures on Mr. Grosjean's part. First, he should not have given Mr. Barrett time off at all in the first instance even though he had a doctor's slip because the appointment should have been scheduled during off-hours. In addition, Grosjean failed to receive a sick slip at all for Mr. Barrett's second absence.

(Doc. 45 at 3–4) (emphasis added). Plaintiff does not dispute that he should not have given Barrett time off at all. The allegation that a younger supervisor was not disciplined for the same conduct does not demonstrate pretext here because plaintiff was Barrett's assigned supervisor. (Doc. 45 at 4). The situation with Barrett's medical documentation for absences does not, therefore, demonstrate pretext.

Plaintiff also disputes Dresner's affidavit allegation that plaintiff had difficulty communicating unfavorable decisions to employees because two employees approached Dresner after plaintiff informed them of a decision. Plaintiff states that Dresner later admitted he speculated as to the reason the employees approached him. Dresner stated that he speculated plaintiff's inability to communicate unfavorable decisions to subordinates was the reason the employees came to him because they must have known he was the person who saw them in the wrong work location. Again, plaintiff does not dispute whether Dresner honestly believed plaintiff's inability to communicate the decision caused the employees to come to him. See Smith, 155 F.3d, 806 ("[S]o long as the employer honestly believed in the

proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless.").

Plaintiff spends much time stating that a younger supervisor, Gallagher, was treated differently than plaintiff. Plaintiff contends that Gallagher was not disciplined when employees approached Dresner after Gallagher spoke with them. Plaintiff alleges that Gallagher was given credit for good performance while plaintiff was evaluated negatively and plaintiff and Gallagher supervised the same employees, performed the same job duties, and dealt with the same personnel problems. Plaintiff contends that Dresner kept a secret file on plaintiff but did not do so for Gallagher.

Plaintiff, however, does not dispute defendants' argument that while Gallagher and plaintiff had the same duties, they did not work on the same shift after 1998. Plaintiff cannot, therefore, prove through these allegations and the third method of proving pretext—defendants' legitimate nondiscriminatory reasons were insufficient to warrant defendants' actions—that defendants' reasons were a pretext because Gallagher was not similarly situated as they did not work the same shift.

Defendants, furthermore, consistently maintain that it was a combination of events that led to plaintiff's transfer. While Gallagher and plaintiff may have been treated differently in a few situations, plaintiff cannot demonstrate that the majority of defendants' legitimate nondiscriminatory reasons were a pretext for discrimination.

Plaintiff claims testimony by Gallagher demonstrates pretext because he stated that he considered plaintiff equally responsible for 1999 operations in the fuel yard and that he also encountered personnel problems. However, "Without more, mere opinions expressed by co-workers who have no direct involvement in the decision-making processes have no probative value as to [defendants'] alleged discriminatory intent." Haley v. General Elec. Co., No. 99-6349, 2001 U.S. App. LEXIS 1702, at *20; 2001 WL 92135, at **7 (6th Cir. Jan. 23, 2001).

Plaintiff disputes Dresner's affidavit allegation that plaintiff did not inform Dresner that Tom Munzer slept while at work. Plaintiff contends Dresner later admitted that he knew plaintiff tried to rectify the problem by taking Munzer off the shift. Plaintiff, however, does not dispute Dresner's main dissatisfaction: plaintiff failed to document the problem and Dresner, therefore, was unable to use the incident later for progressive discipline.

Plaintiff disputes Dresner's affidavit allegation that plaintiff complained to the safety director about extensive hours without first discussing the issue with Dresner. Plaintiff states that Dresner later admitted that an employee could bypass him and discuss the matter directly with the safety director. This type of discrepancy simply is not a genuine issue of material fact. Whether or not plaintiff was entitled to bypass his immediate supervisor, Dresner still was dissatisfied that plaintiff initially did not discuss the matter with Dresner.

Plaintiff disputes Dresner's affidavit allegation that plaintiff failed to unload trains in enough time, thereby creating a backlog. While plaintiff argues that the trains were unloaded as quickly as possible, he does not dispute the legitimate nondiscriminatory reason that he did not schedule enough employees so that the trains could have been unloaded on time.

Plaintiff disputes Dresner's affidavit allegation that plaintiff did not defend his employer when the condition of a structure was questioned and no problem was found. Plaintiff contends that Dresner later admitted that a structural engineer agreed the structure did not look good. Dresner, however, also stated that the engineer guaranteed the safety of the structure so that it continued to operate.

Plaintiff disputes Dresner's affidavit allegation that plaintiff did not force Barrett to obtain new safety shoes by December 14, 1999. Plaintiff contends Dresner later admitted in his deposition that plaintiff forced Barrett to obtain new shoes by December 15, 1999. Dresner's affidavit, however, states that Barrett promised to obtain new shoes by November 26, 1999. Thus, whether plaintiff forced Barrett to obtain new shoes by December 14 or 15, Barrett did not obtain the shoes until mid-December when he promised to obtain them by November 26, 1999 after his injury on November 9, 1999.

As shown, plaintiff has attempted to refute several of the issues discussed in his meetings with Dresner and has attempted to show defendants' legitimate nondiscriminatory reasons are a pretext for age discrimination. Plaintiff cannot, however, show they are

a pretext for discrimination. The best argument made by plaintiff is that Gallagher, a younger supervisor, was not disciplined for some of the conduct for which plaintiff was disciplined. Gallagher was not, however, similarly situated to plaintiff, and defendants consistently maintained that a combination of legitimate nondiscriminatory reasons led to plaintiff's transfer. The remainder of plaintiff's attempts to show pretext simply show slight discrepancies or inconsistencies in the facts.

Plaintiff does not show that defendants' legitimate nondiscriminatory reasons are a pretext for age discrimination. Plaintiff cannot show that defendants' actions even are connected somewhat to plaintiff's age. Plaintiff cannot show that defendants' legitimate nondiscriminatory reasons had no basis in fact, actually did not motivate the defendant's actions, or were insufficient to warrant the defendant's actions. Plaintiff cannot show that defendants' past practices contradicted defendants' legitimate nondiscriminatory reasons. See e.g., Dews v. A.B. Dick Co., 231 F.3d 1016, 1023 (6th Cir. 2000). Simply put, there is no genuine issue of material fact as to pretext.

Defendants' motion for summary judgment on plaintiff's ADEA claim shall be, therefore, granted.

II. State-Based Claim

Plaintiff also claims that defendants violated Ohio's age discrimination law, R.C. § 4112.02(A) and (N), on the basis of the same conduct.

Under Ohio law, the burden of proof and framework for proving age discrimination parallel ADEA analysis. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 357–58 (6th Cir. 1998) (citation omitted). I thus apply the foregoing analysis to plaintiff's state law claim.

Defendants' motion for summary judgment on plaintiff's state-based claim for age discrimination shall be, therefore, granted.

CONCLUSION

It is, therefore,

ORDERED THAT

Defendants' motion for summary judgment be, and hereby is, granted.

So ordered.

/s/ James G. Carr
James G. Carr
United States District Judge

Footnote(s)

1 The policy plaintiff refers to provides:

Supervisors should provide feedback and coaching to employees on an ongoing basis during the performance year to review problems, discuss opportunities for enhanced performance, discuss any changes that occur, provide guidance and support, determine development

needs, and recognize achievement. An employee should be notified as soon as possible if his performance expectations are not met. Documentation is required so that employees and supervisors can track progress and accomplishments.

(Doc. 40 at 12) (emphasis omitted) (citations omitted).

Case No. 3:01 CV 7213

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Grosjean,
Plaintiff,

v.

First Energy Corporation, et al.,
Defendants.

JUDGMENT ENTRY

For the reasons stated in the Order filed February 20, 2002, it is hereby

ORDERED that defendant's motion for summary judgment is hereby granted. Case closed.

So ordered

/s/ James G. Carr
James G. Carr
United States District Judge

(2)

No. 03-1197

Supreme Court, U.S.
FILED
MAR 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM GROSJEAN,

Petitioner,

v.

FIRSTENERGY CORP. and TOLEDO EDISON COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent FirstEnergy Corp. is a publicly owned Ohio corporation. The Toledo Edison Company, an Ohio corporation, is a wholly owned subsidiary of FirstEnergy Corp.

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Ohio Revised Code § 4112.01 1

RULE

Federal Rule of Civil Procedure 56 9

STATEMENT OF THE CASE

Petitioner William Grosjean filed a complaint against Respondents FirstEnergy Corp. and Toledo Edison Company (collectively "FirstEnergy") in the United States District Court for the Northern District of Ohio on May 2, 2001, alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* and Ohio's analogous anti-discrimination statute, Ohio Revised Code §§ 4112.01, *et seq.* He alleged a discriminatory demotion and a discriminatory failure to rehire as well as a discriminatory denial of a bonus. On February 22, 2002, after full briefing by the parties, the district court granted summary judgment to FirstEnergy on the basis that Grosjean had failed to rebut FirstEnergy's legitimate non-discriminatory reasons for its actions which were his abysmal performance and failure to improve. Contrary to Grosjean's assertion at page 7 of his Petition, FirstEnergy argued that Grosjean was not replaced by a substantially younger employee under the fourth prong of the prima facie test in its motion for summary judgment (page 16 of Motion for Summary Judgment) at the district court and on appeal. (page 30 of Appellee Brief.)

Grosjean timely appealed to the Sixth Circuit Court of Appeals on the issue of pretext. On November 13, 2003, the Sixth Circuit Court of Appeals affirmed the district court's decision on other grounds. It found that the issue of pretext need not be reached for the simple reason that Grosjean could not make out a prima facie case. Specifically, he could not demonstrate that he was replaced by someone substantially younger. In so ruling, the Sixth Circuit compared the fifty-four year old Grosjean to Dick Riley, his fifty-one year old replacement and found that an age difference of three years was insufficient to raise an inference of age

discrimination. The Court found that Grosjean was actually replaced by Mr. Riley. However, the Court noted that, even if one looked at John Gallagher (the forty-eight year old FirstEnergy employee who temporarily filled Grosjean's position after Grosjean's transfer), no inference of age discrimination was raised.

The Sixth Circuit exhaustively examined case law from other circuits and noted the general rule that age differences of ten years or more are sufficiently substantial to meet the "substantially younger" prong of the age discrimination prima facie case. Additionally, it noted that the "overwhelming body of cases" in the circuits hold that differences of less than ten years are not significant enough to fulfill the "substantially younger" portion of the test. Based upon its examination of the case law and its own precedent, the Sixth Circuit held that an age difference of six years or less between a plaintiff and a replacement employee is not significant in the absence of direct evidence.

STATEMENT OF THE FACTS

Grosjean was fifty-four years old at the time of the events giving rise to the case. He began his employment with FirstEnergy Corp. at its predecessor company Toledo Edison in October 1970. In July 1990 Toledo Edison promoted him to the position of Supervisor-Plant Maintenance. He was subsequently reassigned in June 1998 to Toledo Edison's Bay Shore Power Plant where he supervised yard crews and was responsible for safe, efficient operation and maintenance of the fuel handling facilities. In 1998 Kenneth Dresner became Grosjean's supervisor as director of production. Shortly after Dresner assumed this position, Grosjean was made

Supervisor-Yard and worked for six months with a fellow supervisor, John Gallagher, to train for the position.

Dresner began to have serious concerns about Grosjean's supervisory abilities. Grosjean had, at various times, 1) authorized overtime pay for an employee who had not worked the overtime, violating company policy and the employee's collective bargaining agreement, 2) scheduled another employee for unnecessary overtime, another violation of company policy, and 3) granted unpaid time off to another employee without requiring the necessary medical documentation. This was another violation of company policy as well as a violation of Dresner's direct orders. Grosjean also exhibited difficulty communicating with his subordinates and an unwillingness to address unpopular management decisions, instead referring such questions to Dresner. Grosjean blamed Dresner for difficult decisions, which understandably undermined employee morale and Dresner's authority. Union officials exhibited a reluctance to take matters up with Grosjean, whose responsibility it was to address them.

Dresner counseled Grosjean about poor supervisory performance in July 1999, November 1999, and December 1999. On each occasion they discussed specific mistakes and weaknesses. Each time Dresner instructed Grosjean to improve. In March 2000, Dresner and Grosjean met for Grosjean's annual performance review in which he received a "does not meet expectations" rating. At that time, Dresner informed Grosjean that the company was removing his supervisory responsibilities because he had demonstrated an inability to handle such duties. Grosjean's title did not immediately change and his rate of pay remained the same. At the next performance review following the removal of

his supervisory duties, Grosjean received a "meets expectations" rating from the company.

Grosjean re-applied for his previous supervisory job, but FirstEnergy (which by this time had acquired Toledo Edison) hired no one to fill the position. John Gallagher, who was forty-eight years old, temporarily took over the position. Grosjean once again applied for his previous position after a second posting of the job. FirstEnergy instead hired Dick Riley, a fifty-one year old individual to fill the position. Grosjean remains employed with FirstEnergy today but does not hold supervisory responsibilities.

SUMMARY OF THE ARGUMENT

In his Petition, Petitioner William Grosjean asserts that there are two questions for this Court's review: 1) whether the burden-shifting test under *McDonnell Douglas* remains viable in the age discrimination context, and 2) whether the Sixth Circuit Court of Appeals erred when it established a minimum standard for the "substantially younger" test this Court articulated in *O'Connor v. Consolidated Coin Catering*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996). In so doing, however, Grosjean puts forth no valid legal reason as to why either of these issues requires review by this Court. Instead, he articulates his opinion that the Sixth Circuit and the district court made erroneous factual findings or misapplied a properly stated rule of law. These are insufficient considerations upon which this Court should grant certiorari.

In any event, the Sixth Circuit's decision following a review of Grosjean's case evidences no error. In keeping with this Court's precedent in *O'Connor* and *Reeves v. Sanderson*

Plumbing, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), the district court applied and the Sixth Circuit affirmed the use of the *McDonnell Douglas* burden-shifting framework. Further, the *McDonnell Douglas* burden shifting framework was utilized in both the lower court and upon appellate review, without protest or argument from Grosjean.

With regard to the six-year threshold for the "substantially younger" prong of the *O'Connor* test, the Sixth Circuit simply set a minimum standard to establish a threshold for determination of whether an age discrimination plaintiff has met the minimum burden of the prima facie case where direct evidence is absent. In so doing, it attempted to delineate boundaries to a nebulous concept after performing an exhaustive examination of the federal jurisprudence. The Sixth Circuit in no way foreclosed an ADEA plaintiff from establishing a prima facie case or overcoming the six-year presumption when he or she has direct evidence that age played a part in the employment decision.

REASONS FOR DENYING THE PETITION

I.

GROSJEAN'S QUESTION PRESENTED ON THE ISSUE OF *McDONNELL DOUGLAS* WAS NEVER RAISED BELOW. IN ANY EVENT, THE ARGUMENT HAS NO MERIT.

In his first question presented, Grosjean asks "Is the basic evidentiary framework set forth in *McDonnell Douglas* applicable in the Age Discrimination in Employment Act ("ADEA") context?" This Court is the first forum in which Grosjean has raised this issue. This question was not

addressed below by the Sixth Circuit or the district court because both parties treated the issue as if it were settled law, raising no question about the applicability of the *McDonnell Douglas* framework.

Both this Court and the circuit courts have consistently used *McDonnell Douglas* in age discrimination cases. In *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), this Court used a modified *McDonnell Douglas* burden-shifting test on the assumption that it applied to age discrimination cases. After *O'Connor*, federal courts followed this Court's lead and applied the modified standard consistently when assessing age discrimination cases. Four years later, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court once again stated that although it "has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964 . . . also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the *McDonnell Douglas* framework is fully applicable here." *Reeves*, 530 U.S. at 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105.

Although this Court has not had occasion to apply *McDonnell Douglas* in the age discrimination context since *Reeves*, lower federal courts have proceeded to do so consistently.[1] *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728

1. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), involved the ADEA, but this Court merely articulated the correct pleading standard in discrimination cases.

(4th Cir. 1996); *Bush v. Dictaphone Corp.*, 161 F.3d 363 (6th Cir. 1998); *Hoffman v. Primedia Special Interest Publications*, 217 F.3d 522 (7th Cir. 2000); *Girten v. McRentals, Inc.*, 337 F.3d 979 (8th Cir. 2003); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160 (10th Cir. 2000); *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758 (D.C.Cir. 2002); *Steiner v. Envirosource, Inc.*, 134 F. Supp. 2d 910 (N.D.Ohio 2001); *Woodsmall v. Eclipse Mfg. Co., Inc.*, 249 F. Supp. 2d 918 (E.D.Tenn. 2002).

The *McDonnell Douglas* test is entirely appropriate for assessing a plaintiff's age discrimination case. At its heart, age discrimination is the same as race, sex, or national origin discrimination – a comparison of the treatment of one who is in the protected class (the plaintiff who is older) with one who is not (the replacement who is younger). Without a framework to test the prima facie evidence of a plaintiff, nearly every case would proceed to the legitimate, nondiscriminatory reason and pretext stages. Indeed, under the *O'Connor* "substantially younger" prong, anyone over the age of forty who suffered an adverse employment action and was replaced by someone younger would be entitled to proceed past the prima facie stage.

The "substantially younger" prong is an excellent method by which to delineate cases with merit. One alternative – that one must demonstrate replacement by another person under the age of forty – does not take into account relative ages, and sets up the scenario that a forty-two year old replaced by a thirty-two year old is in a better position in a lawsuit than a fifty-two year old replaced by a forty-two year old. Another alternative, to show he or she is merely older than the replacement, would be so expansive as to be meaningless. The *O'Connor* framework of requiring a showing of substantially younger is the most appropriate test.

II.

THE BRIGHT LINE TEST ESTABLISHED BY THE COURT DOES NOT REQUIRE REVIEW BY THIS COURT.

Grosjean's true complaint is that the six-year test set by the Sixth Circuit was not short enough to protect him. It bears emphasizing that Grosjean actually seeks a factual determination from this Court, as evidenced by his lengthy and argumentative factual recitation. He states that

> [d]espite the ample evidence that Grosjean was replaced by Brad Cloyne, who was in his forties, the Sixth Circuit held that Grosjean was in fact replaced by Riley, who was three (3) years younger than Grosjean, or Gallagher, who was five and a half years (5 ½) years younger than Grosjean, and therefore, that Grosjean was not replaced by an employee who was sufficiently younger.

(Petition, at 9). Grosjean seems to request that this Court articulate a definition for "replacement" or instruct the Sixth Circuit that it erred in its factual determination on the issue of who "replaced" Grosjean.[2] Indeed, he uses terms

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2. In fact, Grosjean barely mentioned Cloyne in his motion for summary judgment, citing in passing the fact that Cloyne may have assumed some of Grosjean's duties after Grosjean was removed from the position. Grosjean states only that Cloyne at some point replaced Gallagher, Grosjean's replacement. (Brief in Opposition to FirstEnergy's Motion for Summary Judgment, at 24-25). Significantly, however, Cloyne was not Grosjean's replacement. *See Grosjean*, 349 F.3d at 336 (noting that replacement does not take place when another employee assumes some duties in addition to other duties or the work is redistributed). The Sixth Circuit correctly found that Grosjean was replaced by the fifty-one year old Riley.

throughout his factual statement such as "arguably," "erroneously," "the Sixth Circuit ignored evidence," "disputed evidence," and "despite ample evidence." (Petition, at 7, 9). These goals of articulating a standard not properly before the court or re-evaluating a lower court's factual determination are not sufficient for a writ to issue.

Grosjean also incorrectly asserts that the requirement that an age difference be "substantial" always presents a question of fact. Grosjean basically postulates that Motions for Summary Judgment under Federal Rule of Civil Procedure 56 are inapplicable to age discrimination cases once it is established that the replacement is younger than the plaintiff (no matter how much younger). Notably, however, he fails to put forth any legal support for the proposition. Instead, his cited cases only reiterate the summary judgment standard – if reasonable minds could differ, a fact finder will have to establish the facts by a preponderance of the evidence.

An age discrimination case is no different than any other discrimination action in which summary judgment is appropriate if the standard under Federal Rule of Civil Procedure 56 is met. Even though the "substantially younger" element is unique to an age discrimination claim, it is equally capable of summary judgment resolution when reasonable minds could not differ that this standard is met. If every age discrimination case was sent to the fact finder where the replacement was younger than the plaintiff (no matter how slight the age difference is) the courts would be overwhelmed with wildly inconsistent results. Accordingly, some guiding principle is necessary such as the one adopted by the Sixth Circuit so that Federal Rule of Civil Procedure 56 can be effectively applied to age discrimination cases.

Grosjean states that the Sixth Circuit's rule means that, unless the age difference is six years or more, a plaintiff loses. This mischaracterizes the Sixth Circuit's decision. The purpose of the prima facie elements is to establish a threshold over which a plaintiff may cross with only an inference. For example, in sex discrimination cases, a qualified woman who was terminated but replaced by another woman, without more, cannot proceed past the prima facie case. Indeed, in any discrimination case that uses the *McDonnell Douglas* framework, a plaintiff never reaches the legitimate nondiscriminatory reason/pretext analysis unless one can demonstrate the prima facie case.[3] Without even an inference that age played any part in an adverse employment decision, allowing a plaintiff to proceed through the entire *McDonnell Douglas* analysis would be ultimately futile. As the Sixth Circuit correctly noted citing this Court's reasoning in *O'Connor*, the required prima facie inference "cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Grosjean*, 349 F.3d at 336, citing *O'Connor*, 517 U.S. at 313, 116 S. Ct. 1307.

The Sixth Circuit examined the post-*O'Connor* jurisprudence carefully in deciding where to draw the line.[4]

---

3. It bears noting that the district court has already ruled that FirstEnergy's legitimate nondiscriminatory reason for its action – Grosjean's poor performance – was *not* pretextual. Thus, even assuming that Grosjean fulfilled his prima facie case, his claim still fails.

4. Grosjean is incorrect when he states that the Sixth Circuit recognized that "no other Circuit has ever established a bright-line test." (Petition, at 9). The Sixth Circuit clearly noted and discussed the Seventh Circuit's bright-line rule of ten years. *See Grosjean*, 349 F.3d at 339, citing *Hartley v. Wisconsin Bell*, 124 F.3d 887 (7th Cir. 1997).

An age difference of ten years or more is generally sufficient for an age discrimination plaintiff to move past the prima facie stage. *See, e.g., Carlton v. Mystic Transp.*, 202 F.3d 129, 135 (2d Cir. 2000); *Brown v. Metropolitan Opera Ass'n*, 192 F.3d 310, 317 (2d Cir. 1999); *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 236 (3d Cir. 1999); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 729-30 (3d Cir. 1995); *O'Connor v. DePaul Univ.*, 123 F.3d 665, 669-70 (7th Cir. 1997); *Weigel v. Baptist Hosp.*, 302 F.3d 367, 375 (6th Cir. 2002); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1998); *Barnett v. Department of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998); *EEOC v. Board of Regents of Univ. of Wisc. Sys.*, 288 F.3d 296, 303 (7th Cir. 2002); *Miller v. Borden*, 168 F.3d 308, 314 (7th Cir. 1999); *Baron v. City of Highland Park*, 195 F.3d 333, 340 (7th Cir. 1999); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 923-24 (8th Cir. 1999); *Roxas v. Presentation Coll.*, 90 F.3d 310, 316 (8th Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). When it comes to age differences of less than ten years, however, some courts have found that such a difference is not significant enough for the prima facie case in the absence of any other evidence. *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000); *Cramer v. Intelidata Techs. Corp.*, 168 F.3d 481, 1998 WL 911735 (4th Cir. 1998); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 619 (7th Cir. 2000); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412 & n.6 (8th Cir. 1997); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1166 (10th Cir. 2000); *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758, 767 (D.C. Cir. 2002). Only the Ninth Circuit

and the Eleventh Circuits deviate from these general principles with any regularity.[5]

The Sixth Circuit's decision in *Grosjean* is an appropriate method of bringing order to the analysis of the cases where the replacement worker is less than ten years younger than the plaintiff.[6] This is not a "harsh" rule, as Grosjean claims. In so stating, he ignores case law from other circuits refusing to find a prima facie case where the age difference was *greater* than six years. Indeed, the Sixth Circuit examined the case law in order to determine an equitable basis for articulating the fourth prong. Six years is more generous to plaintiffs than seven, or more years. Grosjean really complains that the Sixth Circuit did not pick five, four, three, two, one years, or no age difference.

Grosjean misconstrues the Sixth Circuit's standard articulated in *Grosjean*. It certainly does not mean that any plaintiff replaced with someone six years younger or less

5. Indeed, state courts have also developed ways of interpreting analogous state anti-discrimination statutes. For instance, the Ohio Supreme Court recently overruled its precedent that an age discrimination plaintiff cannot fulfill a prima facie case if he is replaced by someone in the protected class. Now, plaintiffs bringing age discrimination claims under Ohio Revised Code Chapter 4112 may show replacement with someone "substantially younger" in order to fulfill the prima facie case, thus, bringing precedent under Ohio law in line with the *O'Connor* standard. *See Coryell v. Bank One Trust Co., N.A.*, 101 Ohio St. 3d 175, 803 N.E. 2d 781 (2004).

6. Grosjean cites one case advocating a rule that replacement by an *older* employee does not necessarily foreclose a prima facie case of age discrimination. This case appears to no longer be good law in light of this Court's holding in *General Dynamics Land Systems v. Cline*, 124 S. Ct. 1236 (2004)).

automatically loses. The specific holding in this case was that, "in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant." *See also, e.g., Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000); *Bennington v. Caterpillar, Inc.*, 275 F.3d 654 (7th Cir. 2001) (In cases where the age difference between the plaintiff and the individual treated more favorably is less than ten years, "the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant."), citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). Thus, if a plaintiff had *any* direct evidence that age played a part in the adverse employment decision or his employer considered age to be significant, the amount of age difference between the plaintiff and his replacement would be of no consequence.

The Sixth Circuit's rule is by no means as harsh as Grosjean incorrectly implies. It simply requires that an age discrimination plaintiff point to something besides an accident of birth or few years of age difference to raise an inference that age discrimination occurred. Under the Court's holding in *Grosjean*, if a plaintiff alleges direct evidence at the outset and competently demonstrates such evidence at the summary judgment stage, he would still be permitted to proceed to trial, even though the age difference is less than six years.

An age discrimination case is necessarily about the birth order of two individuals. It naturally follows that for age discrimination to have occurred, any slight disparity in age should not be sufficient to raise suspicion that discriminatory

decision-making occurred. Indeed, unless a replacement worker and a plaintiff were born on the same day at the same time, there will always be a difference in ages. A plaintiff cannot carry the prima facie burden simply by offering evidence of an employer's choice of a younger employee. This Court in *O'Connor* instructed that an ADEA plaintiff has not established a prima facie case without producing "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . ." *O'Connor*, quoting *Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Thus, it is not the replacement by merely a younger person that creates the inference, but the replacement by one "substantially younger" that "is a far more reliable indicator of age discrimination."

In the instant case, Grosjean has offered no direct evidence of age discrimination. Indeed, he presents nothing besides a birth order separated by only a few years to support his claim that FirstEnergy's decision was due to his age. In his Petition to this Court, he attempts to extrapolate evidence of discrimination from discussions of an alleged incomplete investigation and other issues which have nothing to do with age. In so doing, he simply reiterates his desire to have one more chance to re-litigate the facts in this case.

CONCLUSION

Here, Grosjean desires another opportunity to re-argue the facts but otherwise puts forth no sound reason for this Court to grant his Petition. His desire for this Court to re-evaluate the use of *McDonnell Douglas* in the age discrimination context was never presented to the courts below. Indeed, the parties and the lower courts unanimously agreed, without objection from Grosjean, that *McDonnell Douglas* was the appropriate framework for analysis. With respect to the six-year standard for proving that his replacement was "substantially younger", Grosjean puts forth no convincing legal justification that the Sixth Circuit's decision should be reviewed by this Court.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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